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In the Supreme Court of the United States

OCTOBER TERM, 1975

WAYNE O. WOODRUFF AND ANDREW BARR, SPECIAL PROSECUTORS, PETITIONERS

v.

UNITED STATES OF AMERICA AND JAKE JACOBSEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-28 to A-49) is reported at 524 F.2d 504. The district court's opinion denying the government's motion to dismiss the indictment (Pet. App. A-1 to A-20) is reported at 381 F. Supp. 214. The opinion of the district court appointing petitioners as special prosecutors (Pet. App. A-21 to A-27) is reported at 396 F. Supp. 803.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 1975. On January 8, 1976, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including February 6, 1976.

The petition was filed on February 5, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1291, which does not confer jurisdiction upon this Court. In a case such as this the Court's jurisdiction, if it exists (see pp. 6-8, *infra*), is conferred by 28 U.S.C. 1254(1).

STATUTE INVOLVED

Rule 48(a), Fed. R. Crim. P., provides in pertinent part:

> The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate.

QUESTION PRESENTED

Whether the court of appeals correctly determined that the district court abused its discretion in denying the government's motion to dismiss the indictment.

STATEMENT

On February 6, 1974, a federal grand jury in the United States District Court for the Northern District of Texas returned a multiple-count indictment charging Jake Jacobsen and Ray Cowan with various offenses involving the misapplication of funds of a savings and loan association and charging Jacobsen with perjury before the grand jury (Pet. App. A-1 to A-2). On May 21, 1974, in connection with the investigation by the Watergate Special Prosecution Force into the campaign contributions of the Associated Milk Producers, Inc., and affiliated organizations, the United States and Jacobsen agreed that Jacobsen would plead guilty to one felony charge of bribery of a federal official, in violation of 18 U.S.C. 201(f), would make full and truthful disclosure of all relevant documents and information in his knowledge

and possession, and would testify when called upon by the United States in any criminal proceeding, including the trial in the Northern District of Texas against Cowan. In return, the United States agreed that it would not prosecute the Texas indictment or bring other potential charges against Jacobsen (Pet. App. A-3).

Jacobsen thereupon gave testimony incriminating himself and others before a grand jury in the District Court for the District of Columbia, and, pursuant to the agreement, on August 7, 1974, he pleaded guilty to an indictment returned by the grand jury charging him with a violation of Section 201(f) (Pet. App. A-31).[1]

On August 29, 1974, the United States moved under Rule 48(a), Fed. R. Cr[illegible] P., to dismiss the indictment pending in the Northern District of Texas. As the court of appeals observed (Pet. App. A-31 to A-32):

> A copy of the plea agreement was attached to the motion. The motion to dismiss recited that the Office of the Special Prosecutor and the Attorney General believed that Jacobsen's testimony was necessary to the investigation and prosecution of the indictment in the District of Columbia; that if it did not enter into the plea agreement, the testimony of Jacobsen in that case, or any other case in which his testimony is relevant, would be lost; that the motion to dismiss the Texas charges was made in good faith, in accordance with the plea agreement and not for purposes of harassment; and that the interest of

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[1] In April 1975 Jacobsen also testified as a government witness at the trial of former Secretary of the Treasury Connally on an indictment returned by the same grand jury.

Sentencing of Jacobsen has been deferred pending final resolution of the issues involved here.

> justice will be best served by disposing of the charges against Jacobsen in this manner. * * * Jacobsen's Texas counsel joined in the United States Attorney's motion to dismiss.

On September 6, 1974, the district court denied the motion on the ground that it was unsupported by facts showing that a dismissal would serve "the best interest of justice" (Pet. App. A-16). The government thereupon advised the district court that it would not prosecute Jacobsen under the indictment, and on October 23, 1974, the court entered an order appointing the petitioners, private attorneys having no affiliation with the Department of Justice, to be "special prosecutors" with "full authority to control the course of investigation and litigation related to the offenses charged in the indictment and to handle all aspects of the case to the same extent as a United States Attorney in any criminal prosecution" (Pet. App. A-26 to A-27).[2]

The United States simultaneously noticed an appeal of the order appointing special prosecutors and petitioned the court of appeals for a writ of mandamus directing the district court to vacate the order. The court of appeals treated the matter as an appeal and reversed on the ground that the district court's refusal to dismiss had been error (Pet. App. A-28 to A-49). It ruled that a district court has "the power and the duty to exercise a discretion for the protection of the public interest" when passing on a Rule 48(a) motion to dismiss (Pet. App. A-40), but that the Executive is "the first and presumptively the best judge of whether a pending prosecution should be terminated," and its judgment "should not be judicially disturbed unless

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[2]Specifically, the court appointed Barr to be "first assistant" to special prosecutors Woodruff and Patrick E. Higginbotham. The latter is now a United States district court judge in the Northern District of Texas and has not joined in this petition.

clearly contrary to manifest public interest" (Pet. App. A-45 to A-46).

It further ruled that the reasons relied on by the district court in denying the government's motion were "legally insufficient to overcome the presumption of the government's good faith and establish its betrayal of the public interest" (Pet. App. A-47). The court determined that both the conduct and the substance of the plea negotiation were proper, and that the government's motion and supporting memorandum set forth adequate reasons for the dismissal of the indictment (Pet. App. A-48). "In sum," said the court, "it was within the province of * * * the government to weigh the relative importance of two separate prosecutions in two separate districts and dispose of them as practical considerations seemed to dictate," and "[n]othing in this record overcomes the presumption that [it] did so in good faith for substantial reasons sufficiently articulated in the motion to dismiss" (Pet. App. A-48 to A-49).

Having found error in the district court's denial of the government's motion to dismiss, the court of appeals specifically declined to consider whether a district court has the power to implement a proper denial of a Rule 48(a) motion by appointing a special prosecutor in cases where the government has refused to prosecute (Pet. App. A-49).

ARGUMENT

1. We note at the outset that there is serious doubt whether the Court has jurisdiction to entertain this petition. Under 28 U.S.C. 1254(1),[3] only a "party" to a case in the court of appeals may seek further review in this Court, *United Auto Workers* v. *Scofield,* 382 U.S. 205, 208-209,[4] and Messrs. Woodruff and Barr are not themselves "parties" by virtue of the district court's appointment of them as counsel to represent the United States.

It is no answer to say that procedural necessity dictates that their standing be assumed to assure review of the district court's order, for the order itself authorizes Messrs. Woodruff and Barr to represent the United

[3]We assume that the petition means to invoke this jurisdictional statute and that the reference to 28 U.S.C. 1291 (Pet. 2), governing the jurisdiction of courts of appeals over final decisions of the district courts, is oversight.

[4]A possible exception to this rule arises where a petitioner seeks review under Section 1254(1) of an order denying a motion to intervene. If intervention should have been granted as "of right" under Rule 24(a), Fed. R. Civ. P., then the Court's decision on the merits that the petitioner should have been granted party status below will suffice to confer jurisdiction over the petition for certiorari. See *United Auto Workers* v. *Scofield, supra.* This exception can have no application here. The petitioners have never sought to intervene in this case. (Indeed, there is no provision in the Federal Rules of Criminal Procedure allowing for intervention in a criminal case, and even if it be assumed that when the United States appealed to the court of appeals the case took on some of the characteristics of a civil cause, petitioners do not have the personal stake in the outcome of this litigation necessary to qualify them as intervenors). In any event, as we point out in the text, no ruling by this Court on the merits of petitioners' claims would remove the jurisdictional bar, and thus the principles underlying *Scofield's* exception are inapplicable.

States only "to the same extent as a United States Attorney in any criminal prosecution" (Pet. App. A-27). The order did not confer upon the special prosecutors powers *beyond* those possessed by United States Attorneys, and there is no indication that the district court meant to override the plain provisions of 28 U.S.C. 518(a), which expressly reserves to the Attorney General and the Solicitor General the authority to represent the United States in this Court.[5] There is thus no warrant for the Court to postpone ruling on the jurisdictional question in the expectation that a decision on the merits might cure a defect on the face of the petition.

In sum, Messrs. Woodruff and Barr as private individuals are not parties to this litigation and as special prosecutors are statutorily forbidden to petition for a writ of certiorari on behalf of the United States. In these

[5]That provision reads:

> Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suits in the Court of Claims in which the United States is interested.

In the *Confiscation Cases,* 7 Wall. 454, 458, decided at a time when the predecessor to Section 518 mentioned only the Attorney General, this Court noted that United States Attorneys (then called district attorneys) had authority over the government's litigation only in the lower courts:

> Such control * * * ceases whenever such a suit, civil or criminal, is transferred to this court by writ of error, appeal, or certificate of division of opinion, as the [predecessor statute] provides, that it shall be the duty of the Attorney-General to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and such has been the unbroken practice of this court in such suits from the organization of the judicial system to the present time. * * * [I]n the case of *The Gray Jacket* [5 Wall. 370] * * * this court decided that in such suits no counsel will be heard for the United States in opposition to the views of the Attorney-General, not even when employed in behalf of another of the executive departments of the government.

circumstances we submit that the Court has no jurisdiction over the petition under Section 1254(1).[6]

2. In any event, even assuming that petitioners have properly invoked the jurisdiction of this Court, there is no reason to disturb the court of appeals' construction of Rule 48(a), Fed. R. Crim. P., or its application of that Rule to this case.

Rule 48(a) provides that the government "may by leave of court file a dismissal of an indictment." Petitioners do not contest the Rule's implicit recognition of the government's discretionary power to terminate a prosecution. Rather, they claim that the court of appeals, in ruling that the government's decision to dismiss an indictment should be accorded a presumption of regularity and overriden only when "clearly contrary to manifest public interest" (Pet. App. A-45 to A-46), has so restricted the role of the district court under Rule 48(a) that it "cannot independently exercise sound judicial discretion to protect the public interest" (Pet. 10-11).

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[6]Had the court of appeals acted pursuant to the government's petition for a writ of mandamus against the district court judge, rather than pursuant to the government's appeal from the order, the district judge could have sought certiorari, as in *Platt* v. *Minnesota Mining & Manufacturing Co.*, 376 U.S. 240. But the district court was not itself a party to the appeal, and in any event Judge Hill has not petitioned for certiorari.

In the court of appeals, out of an abundance of caution, the United State styled its appeal "United States of America, Appellant v. Ray Cowan and Jake Jacobsen, Defendants, and Wayne O. Woodruff, et al., Special Prosecutors, Appellees." The government's naming of petitioners as "appellees" in the court of appeals did not suffice, however, either to make them parties or to concede their authority to represent the United States in this Court, under Section 518.

We cannot agree. In our view, the court of appeals' approach to Rule 48(a) reflects a sensitive appreciation of the respective roles of the prosecutor and the district court in our system of criminal justice, while at the same time fully safeguarding the public interest in seeing justice done. The Constitution assigns to the President the duty to "take Care that the Laws be faithfully executed" (Article II, Section 3), and this Court has said that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case" (*United States* v. *Nixon,* 418 U.S. 683, 693). This absolute discretion resides in the Executive not simply as acknowledgement of the constitutional commitment to the separation of powers, but in reflection of the pragmatic truth that, at least in individual cases, by design and habit the prosecutor's office is a forum better suited than the judge's chambers to a determination of the most efficient and orderly allocation of the government's litigating resources.

Even if Rule 48(a) restricts the prosecutor's discretion in some measure once an indictment has been returned, surely the court of appeals was correct in concluding that "[t]he Executive remains * * * the first and presumptively the best judge of whether a pending prosecution should be terminated" (Pet. App. A-45). This ruling amounts to little more than a recognition that a "presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 14-15. See *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 415; *Pacific States Box and Basket Co.* v. *White,* 296 U.S. 176, 185.

There is no basis for petitioners' fear (Pet. 9) that the court of appeals' decision "reliev[es] the Executive of any obligation to explain or justify its exercise of discretion" in moving to dismiss an indictment under Rule 48(a).[7] The court of appeals did not hold, contrary to petitioners' suggestion (Pet. 14), that the district court must grant such a motion upon the mere announcement by the government that a plea agreement had been reached and "in the absence of affirmative evidence of bad faith." Rather, the court held that (Pet. App. A-45) Rule 48(a) "should and can be construed to preserve the essential judicial function of protecting the public interest in the evenhanded administration of criminal justice * * * ," and (Pet. App. A-48) that the reasons offered by the government in support of its motion in this case were fully adequate to allow the district court properly to discharge its judicial function. As the court noted (*ibid.*):

> The representations in the motion and supporting memorandum were not merely conclusory; they specified the investigation being pursued in the District of Columbia and the necessity of obtaining Jacobsen's cooperation under the plea agreement calling for dismissal of the Texas charges. We are convinced that this is legally sufficient to justify

[7]Nor is there any reason to believe that this decision will somehow impair the district court's ability to satisfy itself that the standards of Rule 11(e), Fed. R. Crim. P., have been met when passing on negotiated guilty pleas (Pet. 11-12). Plea agreements under Rule 11 and dismissals under Rule 48 quite obviously have different purposes and consequences, and the district court's decision whether to accept a plea leading to a criminal conviction will just as obviously require different procedures and showings from its decision whether to permit a prosecution to be abandoned at the government's suggestion. In short, the instant decision has no implications whatever for Rule 11(e) jurisprudence.

> leave of court to dismiss the Texas charges against Jacobsen in consideration of his guilty plea in the District of Columbia.

Neither harassment nor favoritism has ever been suggested to lie behind the decision to dismiss the indictment against Jacobsen, and accordingly no additional "factual presentation" (Pet. 12) or "factual support" (Pet. 14) for the government's motion was necessary. Here the government explained to the district court that it was seeking to terminate the prosecution of Jacobsen in the consideration that the gain to the public to be achieved by the expected facilitation of other, important investigations and prosecutions outbalanced the public's interest in subjecting this particular defendant to the possibility of greater punishment. These were "substantial reasons sufficiently articulated in the motion to dismiss" (Pet. App. A-49), and the court of appeals ruled correctly that the district court erred in rejecting them.[8]

Finally, even were this Court disposed to disagree with the conclusion of the court of appeals, we note that the circumstances of this case are quite extraordinary and the action of the district court virtually unprecedented. There is little reason to suppose that the

[8]The court of appeals, correctly in our view, declined to reach the question whether a district court has the power to effectuate a proper denial of a Rule 48(a) motion by appointing special prosecutors in cases where the government declined to carry on the prosecution itself. Although we believe a district court possesses no such power (cf. *Buckley* v. *Valeo*, No. 75-436, decided January 30, 1976, slip op. 111-137), we do not elaborate our argument here.

issue presented here will recur with any frequency, and accordingly little basis to justify review by the Court at this time.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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